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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

MARTIN M. MADSON,

Petitioner,

-vs-

JANIE MADSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON STATE

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Petitioner pro-se

QUESTION PRESENTED:

Does the practice of Washington State courts which allows one side to argue at a motion for reconsideration, but denies the other party an opportunity to argue, violate the due process requirement of the Fifth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES:

The parties are only those named in the heading of this action.

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The petitioner Martin M. Madson respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Washington State and the decision of the Court of Appeals of Washington State, said final order being entered March 31, 1992.

OPINION BELOW:

The order of the Washington Supreme Court, the Court of Appeals, and the decision of the Court of Appeals are retyped in the appendix hereto.

JURISDICTION:

Jurisdiction is laid under 28 U.S.C. § 1257(3), ". . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . ."

STATUTE INVOLVED:

Washington State Civil Rule for Superior Courts Number 59(e) provides:

> "(e) Hearing on Motion. When a motion for reconsideration or for a new trial is served and filed, the judge by whom it is to be heard may on his own motion or upon application determine:
>
> (1) . . .
> (2) . . .
> (3) Nature of Hearing. Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed."

The decision below holds that such a rule permits the court to allow one side, but not the other, to argue orally.

STATEMENT OF THE CASE:

This case began as an action for dissolution of marriage. The parties were married April 13, 1975. The respondent filed a petition for dissolution of the marriage April 11, 1986. One child was born to the marriage, and the parties had acquired substantial community property.

An initial agreed order was entered designating the respondent as the primary residential parent (giving her what is known in the other 49 states as "custody"). The order further required the petitioner to pay $2,500 per month as spousal maintenance and $400 per month as child support.

On November 8, 1988, the petitioner here filed a motion for relief from those payments because his business was failing and his health was deteriorating. In that motion he advised the court he was preparing to file a petition in bankruptcy,

which was filed June 12, 1989. The motion for relief from the payments was denied.

On May 15, 1989, the petitioner here filed a motion to be designated the primary residential parent. Beginning with this motion, I appeared pro se through the proceedings.

Pursuant to an order of relief from the bankruptcy stay, the case proceeded to trial June 26, 27, and 28, 1989. The court took the case under advisement. On August 25, 1989, the court held a further hearing, but refused to allow me to offer evidence of offsets to and payments of what the court considered to be unpaid back support.

On September 12, 1989, the court filed findings of fact, conclusions of law, and a decree of dissolution which contained a judgment for $45,000 in past-due support and $6,000 in interest on that sum.

I filed a motion for reconsideration and for a new trial. The court set the case for hearing January 25, 1990, and the matter was briefed. As the hearing began the court said that it would strike the judgment. Counsel for the respondent then made extensive oral argument. I then asked for an opportunity to be heard. The court refused to allow that, saying that he normally didn't even allow oral argument on motions for reconsideration.

I appealed to the Court of Appeals, which resulted in the decision attached in the appendix. Following that decision, I moved for reconsideration of the issue by the full court, which was denied by order. I then petitioned for review by the State Supreme Court, which resulted in the order on March 31, 1992.

REASONS FOR GRANTING THE WRIT:

Washington State Civil Rule 59(e)(3) as applied by the State Supreme Court to allow one party, but not the other, to make oral argument is repugnant to the Fifth and Fourteenth Amendments of the United States Constitution.

Procedural due process has been protected by this court at least since Hovey v. Elliot, 167 U.S. 409 (1896). This court has held that argument may be oral or written, Morgan v. U.S., 298 U.S. 468 (1936), and I have no argument with that.

However, the Washington Supreme Court has here upheld an interpretation of Civil Rule 59(e)(3) which allows only one side to present oral argument. In this case, the unrebutted oral argument was alone sufficient to cause the trial court to reversal its formerly-announced decision, but I was not allowed to make any

rebuttal, although I was present at the hearing.

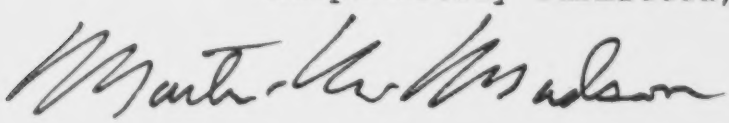
Fundamental fairness in holding any hearing would seem to require that if one side can submit briefs, the other can; if one side can present evidence, the other can; and if one side can present oral argument, the other side can.

The Washington Court of Appeals has held that the first two principles are true, Marriage of Ebbinghausen, 42 Wn. App. 99 (1985), but in this case has concluded that due process may permit a court to hear only one side of an oral argument, reverse its decision based on that oral argument, and then deny the other side the opportunity to be heard. This practice makes for a very tilted playing field, and seems repugnant to the procedural due process requirements of the Fifth and Fourteenth Amendments of the Constitution.

CONCLUSION:

For the reasons set forth above, this petition for certiorari should be granted and the case remanded to the trial court for a hearing meeting the due process standards of the United States Constitution and the holdings of this court.

Respectfully submitted,



Martin M. Madson
Petitioner pro se

THE SUPREME COURT OF WASHINGTON

In the Matter of the Marriage of MARTIN M. MADSON, Petitioner, and JANIE MADSON, Respondent.	NO. 58943-7 C/A NO. 25561-4-I

This matter came before Department I of the Court on its March 31, 1992, Motion Calendar on Petition for Review. Justice Utter sat as Justice Pro Tem for Chief Justice Dore on Department I. Department I having considered the Petition and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petition for Review be denied.

DATED at Olympia, Washington this 31st day of March, 1992.

/s/ Robert F. Utter
Acting Chief Justice

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON
DIVISION ONE

IN RE THE MARRIAGE OF:	)	
	)	
MARTIN M. MADSON,	)	NO. 25561-4-I
	)	
Appellant,	)	ORDER DENYING
	)	MOTION TO
and	)	MODIFY
	)	
JANIE MADSON,	)	
	)	
Respondent.	)	
	)	

Appellant Martin Madson has filed a motion to modify the commissioner's ruling granting respondent's motion on the merits to affirm. A panel of this court has considered the matter pursuant to RAP 17.7 and State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985), and has determined that the motion should be denied. Now, therefore, it is hereby.

ORDERED that the motion to modify is denied.

Done this 31st day of December, 1991.

/s/ Coleman, J.

/s/ Agid, J. /s/ Baker, J.

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON
DIVISION ONE

IN RE THE MARRIAGE OF:	)	
	)	
MARTIN M. MADSON,	)	NO. 25561-4-I
	)	
Appellant,	)	COMMISSIONER'S
	)	RULING GRANTING
and	)	MOTION ON THE
	)	MERITS TO AFFIRM
JANIE MADSON,	)	
	)	
Respondent.	)	
	)	

Martin Madson (the "husband") appeals from a decree of dissolution. He contends due process rights were violated when the trial court failed to consider new evidence and to permit additional oral argument in conjunction with his motion for reconsideration. Respondent Janie Madson (the "wife") has filed a motion on the merits pursuant to RAP 18.14(a). The motion is granted.

ISSUES

1. Whether the trial court abused its discretion in dividing the marital property?

2. Whether the trial court lacked jurisdiction to divide the marital property because of the husband's bankruptcy proceedings?

3. Whether the husband's due process rights were violated when the trial court denied his request to submit additional evidence and denied his request to respond to opposing counsel's arguments at the hearing on his motion for reconsideration.

FACTS

Martin Madson and Janie Madson were married in April 1975, and separated in April 1986. One child was born during the marriage. At the time of the separation, the husband entered into an agreed order providing for temporary maintenance and child support payments.

During the marriage, the husband was employed primarily by Security Properties, Inc., a company that formed limited

partnerships in HUD housing projects. As compensation, the husband received a percentage of the general partner's interest in each partnership. At the time of trial, which began on June 26, 1989, the couple had an interest in 9 such limited partnerships (SP partnerships). During the marriage, the husband also formed a series of companies; following separation, the husband continued to transact business through these companies. An agreed order entered in May 1986 required the husband to deposit all business income into a special account to permit a subsequent accounting of all transactions. The husband did not comply with this order. A major portion of the trial was devoted to tracing the husband's business activities during the period between separation and trial.

The trial court divided the primary assets, virtually all of which were

community property, as follows: the wife was awarded the family home, with a net value of $67,000, and all interest in the 9 SP partnerships, valued at $145,000. The husband was awarded a farm, with a net value of approximately $50,000, several unsecured promissory notes in an amount in excess of $200,000, and the businesses formed prior to and during separation. Pursuant to the dissolution decree, the husband assumed any liabilities arising from his business activities subsequent to the separation. The trial court found these liabilities to be as follows:

> Various unsecured liabilities incurred personally by Mr. Madson during the period of the parties' separation in excess of $200,000.00 and various other liabilities owing to Mr. Paul Fenton and others for which SP distributions were assigned by Mr. Madson, and which were in violation of the Agreed Order entered into by the parties in May of 1986, restraining such assignments. Mr. Madson continued to assign said receivables and/or obligations he individually incurred contrary to the Order entered by the Court on November 1, 1988.

Finding of Fact 6(g).

The trial court also entered the following unchallenged findings of fact pertaining to the husband's post-separation conduct:

> 7. Mr. Madson received during the course of the parties' separation in excess of $600,000.00 in distributions from SP partnerships, which he failed to place in a special account, as required by the May, 1986 Order, the expenditure for which he has failed to satisfactorily account, as also required by said Order.
>
> . . .
>
> 10. At the time of the separation, the parties, except for the mortgage on the family home, had less than $4,000 in unsecured obligations. The parties had no other outstanding obligations.
>
> 11. That, among the expenditures [Mr. Madson] made from the post separation SP partnership distributions, and in violation of the May 1986 Court Order, was approximately $51,000.00 set up a trust, $20,000.00 of which was refunded to [Mr. Madson] soon thereafter, for his emancipated daughter from a prior marriage, $20,000.00 on a European vacation in the summer of 1987, and made in excess of $140,000.00 in loans to Alvin Corkland, for which no security was obtained. Most of these funds were loaned to him knowing that

> Corkland was in serious financial trouble, as well as an additional $56,000 in installments before separation.

The trial court also entered a judgment totalling $51,000 for past due maintenance and child support. Findings of fact, conclusions of law, and a decree of dissolution were filed on September 12, 1989.

CRITERIA FOR DETERMINING WHETHER TO GRANT A MOTION ON THE MERITS TO AFFIRM

RAP 18.14(e)(1) provides:

> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the . . . commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court.

In applying these criteria in light of State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985), the commissioner determines that the issues presented are clearly without merit.

DECISION

Issue 1. The husband first contends that the property distribution was inequitable and that the trial court abused its discretion in awarding virtually all of the assets to the wife. The husband maintains that the SP partnerships should have been divided equally.

RCW 26.09.080 charges the trial court in a dissolution proceeding with making a "just and equitable" distribution of the property. In determining a just and equitable distribution, the trial court is to consider, among other things, the nature and extent of the property, the duration of the marriage, and the parties' economic circumstances at the time of the dissolution. RCW 26.09.080. The key to a fair and equitable distribution of property, however, is not mathematical precision, but fairness. In re Marriage

of Clark, 13 Wn. App. 805, 810, 538 P.2d 145, review denied, 86 Wn.2d 1001 (1975). The trial court's considerable discretion in making a property division will not be distributed on appeal absent a manifest abuse of discretion. In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989), review denied, 114 Wn.2d 1002, 788 P.2d 1077 (1990).

The trial court found that during the separation, the husband had received distributions from the SP partnerships totalling more than $600,000. The husband failed to deposit these funds into a special account as required by an agreed order and failed to account satisfactorily for their expenditure at trial. Finding of Fact 7. Among the husband's post-separation expenditures from the SP partnership, distributions were $51,000 to establish a trust fund for a daughter from a prior marriage, $20,000 for a European

vacation, and more than $140,000 inunsecured loans to a person known by the husband to be in serious financial trouble. Finding of Fact 11. The findings of fact are unchallenged and therefore becomes verities on appeal. Para-Medical Leasing, Inc. v. Hangen, 48 Wn. App. 389, 393, 739 P.2d 717, review denied, 109 Wn.2d 1003 (1987). In addition, the findings are amply supported by the evidence.

The trial court awarded the SP partnerships to the wife primarily because of the husband's post-separation conduct. A party's dissipation or concealment of assets is a factor that the trial court may take into account in determining a fair and equitable distribution of property. In re Marriage of Morrow, 53 Wn. App. 579, 588 770 P.2d 197 (1989); In re Marriage of Nicholson, 17 Wn. App. 110, 118-19, 561 P.2d 1116 (1977); Rentel v.

Rentel, 39 Wn.2d 729, 736, 238 P.2d 389(1951). When viewed in light of the husband's unaccounted for expenditure of more than $600,000 in community funds during the period of separation, including $140,000 in unsecured loans to a long-time acquaintance, it cannot be said that the trial court's award of community assets with a net value of $212,000 to the wife was unreasonable or based on untenable grounds. C.f. In re the Marriage of Tower, supra. Consequently, the trial court did not abuse its discretion in distributing the property.

Without assigning error to any finding of fact, the husband contends for the first time in his Reply Brief that the trial court erred in valuing the SP partnerships at $145,000. The trial court's valuation was supported by the testimony of Stephen Troner, the principal of Security Properties, Inc. Finding of

Fact 6(b). The husband argues that the trial court abused its discretion in accepting the valuation of Troner over that of another witness, who had valued the partnerships at $500,000 to $880,000. His assertion that Troner was not qualified to appraise the property, however, is frivolous. Troner was the husband's own witness; he cannot now challenge Troner's qualifications for the first time on appeal. Moreover, the credibility of witnesses and the weight to be accorded testimony is peculiarly within the discretion of the trial court and will not be reviewed on appeal. In re Watson, 25 Wn. App. 508, 511, 610 P.2d 367 (1979).

In summary, the distribution of property was within the discretion of the trial court. The facts upon which the trial court's decision was based are unchallenged and supported by the evidence, and there is "no basis upon

which a claim of abuse of discretion may be grounded." State v. Rolax, supra at 134; RAP 18.14(e)(1)(c).

Issue 2. The husband next contends that the trial court lacked jurisdiction to divide the couple's property because of his pending Chapter 7 bankruptcy proceedings. Pursuant to an order for relief from stay entered June 14, 1989, however, the bankruptcy court expressly authorized the trial court to resolve all issues in the dissolution proceedings, including the division of property. Finding of Fact 8. The existence of the order granting relief from the stay distinguishes this case from those relied upon by the husband. See In re Homan, 112 B.R. 356, 20 Bankr.Ct.Dec. 433, 20 Bankr.Ct.Dec. 487 (9th Cir. BAP (Wash.) (1989)); In re Teel, 34 B.R. 763, 11 Bankr.Ct.Dec. 420, Bankr. L. Rep. P 69, 518 (9th Cir. BAP (Cal.)(1983)).

Issue 3. The husband contends his right to due process was violated when he was denied an opportunity to present evidence of payments that, he maintains, should have been used to offset the judgment for past due maintenance and child support. The husband raised the issue of credits on August 25, 1989, after the trial court had rendered its oral decision. When directed by the trial court to respond as to whether he was going to seek credits, the husband replied:

> I don't know how to respond. You see, if I say "no," then I might be hurting myself sizeable amounts of money because I haven't figured it out. I've got a whole stack of checks. If I say "yes," that might not please everybody here. I don't know. But I do know that I paid things over and above, keeping the bank account filled with money. I paid lots of things. So what do I do? It was a very loose arrangement.

Report of Proceedings (8/25/92), at 47-48.

In response to this "request," the trial

court ruled that the issue of credits was "moot."

The husband's due process argument rests on the assertion that a claim for the past due support obligation was not raised at trial and that there was no evidence to support the finding of an arrearage. The record shows, however, that the husband, who represented himself pro se, raised the issue of credits during opening argument. The husband was informed several times during the course of trial that it was necessary to present evidence in support of his contentions. He failed to present any evidence of the payments he alleges should be used to offset the judgment.

Moreover, there was ample evidence of the arrearage before the trial court; the husband repeatedly conceded during trial that he failed to meet his support obligations after about June 1988. Nor

did the husband dispute the amount of the arrearage. Rather, he argued that he voluntarily paid for certain items in excess of his obligations at the time when he was still making regular payments and that such payments should be offset from the judgment.

In its procedural aspects, the essential elements of due process are "notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case." (Emphasis added.) In re Deming, 108 Wn.2d 82, 94, 736 P.2d 639 (1987) (quoting In re Hendrickson, 12 Wn.2d 600, 123 P.2d 322 (1942)). Here, the record shows that the husband had ample opportunity to present evidence of the claimed offset at trial, but did not do so. Consequently, no due process violation occurred. The husband does not contend that the evidence of payments

constituted "new evidence" that would support a motion for reconsideration. See CR 59(a)(4).

The husband also claims that his right to due process was violated when the trial court did not permit him to respond to certain oral arguments raised by his wife's counsel at a hearing on his motion for reconsideration. The husband had moved for reconsideration of the $51,000 judgment for past-due maintenance, arguing that the trial court had discretion not to enter the judgment where it had already considered the arrearage in arriving at an equitable distribution of the property. See e.g., In re Marriage of Lindsey, 54 Wn. App. 834, 776 P.2d 172 (1989).

The husband's motion for reconsideration, along with other matters, was considered at a hearing on January 25, 1990. Initially, the trial court indicated that it was going to grant the

husband's motion and strike the judgment, in part because it had believed, based on the wife's argument, that it was legally required to enter the judgment. In response, counsel for the wife stated that while that had been his position initially, he had subsequently argued to the court that the value of the property awarded to the wife, even considered together with the $51,000 judgment, did not begin to offset the amount of money unaccounted for by the husband. Counsel also noted the possibility, not challenged by the husband, that the bankruptcy trustee could subsequently set aside the award of the partnership interests but could not set aside the judgment for past due maintenance. The trial judge found that counsel's recitation had refreshed his memory regarding the basis for the award and then denied the husband's motion for reconsideration. The trial court did

not permit the husband to present any additional oral argument.

The husband has no due process right to present oral argument on a motion. Parker v. United Airlines, Inc., 32 Wn. App. 722, 728, 649 P.2d 181, review denied, 98 Wn.2d 1011 (1982); see also In re Deming, supra. Moreover, whether oral argument is permitted on a motion for reconsideration lies within the trial court's discretion. See CR 59(e)(3). The record demonstrates that the trial court was completely aware of the parties' briefs and legal arguments on the motion for reconsideration. See Parker v. United Airlines, supra. The husband makes no contention that he intended to present some new legal response that was required by opposing counsel's oral representations. Under these circumstances, the trial court did not abuse its discretion in refusing to permit additional oral

argument. RAP 18.14(e)(1)(c). Now, therefore, it is hereby

ORDERED that the motion on the merits is granted and the judgment of the trial court is affirmed.

Done this 29th day of October, 1991.

/s/ Julie A. Kesler
Court Commissioner